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# In The Supreme Court of the United States

**OCTOBER TERM, 1962**

**NO. 601**

POLAR ICE CREAM & CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION, an instrumentality of the State of Florida,
Appellees.

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION**

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## BRIEF FOR POLAR ICE CREAM & CREAMERY COMPANY OPPOSING MOTION TO AFFIRM

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### OPINION BELOW

The opinion of the District Court is set forth verbatim at Page 15 of the Appendix to the Jurisdictional Statement of Appellant. The Opinion of the District Court is reported at 208 F. Supp. 899.

## JURISDICTION

The judgment or decree sought to be reviewed was entered on July 26, 1962. The Notice of Appeal was filed on September 21, 1962, in the United States District Court for the Northern District of Florida. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

## CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

Pertinent portions of the Constitution of the United States which this case involves are set forth in Appendix "A", infra, Pages 29, 30.

Pertinent Federal statutory provisions are set forth in Appendix "B", infra, Pages 31, 32.

Pertinent Federal regulations are set forth in Appendix "C", infra, Pages 33-43

Pertinent Florida statutory provisions and legislative history are set forth in Appendix "D", infra Pages 44-50.

## QUESTIONS PRESENTED

### ONE

Whether Chapter 501, Florida Statutes, and all orders arising thereunder are unconstitutional and are in violation of Article I, Section 8, Clause 3 (Commerce Clause) of the Constitution of the United States, in that commerce between the states is burdened unduly by the application of said statute and orders complained of.

## TWO

Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has been ceded to the United States of America in accordance with Article I, Section 8, Clause 17, of the Constitution of the United States, violate Article VI, Clause 2 (Supremacy Clause) of the Constitution of the United States and Federal Procurement statutes and policy.

## THREE

Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has not been ceded to the United States of America, place a prohibition on the Federal Government and therefore so conflict with Federal Procurement statutes and policy (Armed Services Procurement Act of 1947, 62 Stat. 22, 10 USC 2301, et seq.) as to be invalid under the Supremacy Clause, Article VI, Section 2, of the Constitution of the United States.

## FOUR

Whether Chapter 501, Florida Statutes, is unconstitutional and is violative of the Fourteenth Amendment to the Constitution of the United States in the following respects:

(1) That it deprives the Appellant of property without due process of law.

(2) That it denies to the Appellant equal protection of the law.

(3) That it discriminates unreasonably, arbitrarily and oppressively against the the Appellant.

## STATEMENT

This is a direct appeal from the judgment of a Three-Judge court convened in the Northern District of Florida to hear an action brought by Polar Ice Cream & Creamery Company, praying for an injunction and for an order declaring Chapter 501, Florida Statutes, 1961, and rules and orders issued pursuant thereto, to be null and void and unconstitutional. The testimony taken in the cause was transcribed and copies of the transcript were delivered to each of the three judges prior to the time of their decision.

Polar Ice Cream & Creamery Company is a milk distributor whose plant is located in the State of Florida sixteen miles from the Alabama State line. Under the Florida Milk Commission, a base system was instituted whereby each Florida producer who sold milk to the Appellant, Polar Ice Cream & Creamry Company was allotted a certain percentage of Class I sales, which are sales of fluid milk for human consumption, The base percentage was computed so as to give Florida producers 100% of the Class I sales, and Alabama producers, or producers from other states, were allowed no percentage of Class I sales. The base system, as instituted by the Florida Milk Commission, was computed on a percentage of Class I sales and not on a gallonage basis.

Prior to coming within the jurisdiction of the Florida Milk Commission, Appellant had various government contracts for the furnishing of milk to military installations. Contracts with Tyndall Air Force Base and with Fort Benning, Georgia, were introduced into evidence. The United States has exclusive jurisdiction to both of these installations, pursuant to Article

I, Section 8, Clause 17, of the Constitution of the United States. The contract with Fort Benning was in the aggregate amount of $1,760,000.00 and obligated the appellant to supply milk delivered at 58c a gallon. The Florida Milk Commission entered an order requiring the payment of 61c a gallon to Florida milk producers for Class I milk.

The Appellant also contracts with the Navy Mine Laboratories at Panama City, Florida, exclusive jurisdiction to which had not been ceded to the United States.

Much milk from Alabama is sold in the Pensacola milk marketing area. The testimony revealed that more than 150,000 gallons of Alabama milk was delivered in Florida in the month of November, 1961. Alabama milk could be bought by Pensacola distributors for 35c a gallon.

The orders and regulations of the Florida Milk Commission required appellant, and other Florida milk distributors, to purchase all of the milk offered by Florida base producers for Class I use before purchasing milk from outside the state to be utilized in Class I channels and to pay 61c per gallon for such milk. This requirement also applied to any Florida milk delivered to a military installation either within or without the State of Florida, and whether on a military reservation exclusive jurisdiction to which had been ceded to the United States or not.

A tax of 15c per 100 gallons is imposed for each gallon of Florida milk sold and delivered, even to a military installation exclusive jurisdiction to which had been ceded to the United States.

The Florida Milk Act (Chapter 501, Florida Statutes, 1961) was passed under the police powers of the State of Florida and as an emergency measure (A-44).

There was evidence that milk is in tremendous surplus and that a surplus condition has existed for the past ten years.

The Appellee filed a Motion to Affirm on the grounds that the questions are so unsubstantial as not to warrant further argument. This brief is filed in opposition to that motion.

## ARGUMENT

### QUESTION ONE

Whether Chapter 501, Florida Statutes, and all orders arising thereunder are unconstitutional and are in violation of Article I, Section 8, Clause 3 (Commerce Clause) of the Constitution of the United States, in that commerce between the states is burdened unduly by the application of said statute and orders complained of.

The legislature of the State of Florida in 1933 passed the first Milk Act as an emergency measure, and thereafter, the Act has been re-enacted with various changes until 1961, at which time the Act was amended and Chapter 501.05(3) (Appendix "D") commonly called the Just Cause provision, was added to the Act.

Although there was a legislative finding to the effect that there existed a continuing emergency, this finding failed to take into consideration the fact that the production of milk was in tremendous surplus, and it was readily apparent that the entire Act was designed to protect, isolate and insulate the Florida milk producers from competition with milk producers outside of the State of Florida.

Hence, the orders that have been issued by the Commission, and particularly the ones in question in this

case, demonstrate that the aforesaid objective is what the Milk Commission has been and desperately is attempting to achieve.

The evidence showed that the percentage bases allocated to Florida producers gave such producers 100% of the Class I sales, which is the highest classification of milk for human consumption. Distributors also were required to pay 61c per gallon for such milk. The Administrator of the Florida Milk Commission readily admitted (Page 121 of the transcribed testimony) that such base relationship was designed to give preferential treatment to the Florida producers, as compared to producers in Alabama, or in other states. The Administrator further admitted that if the milk were sold to a military installation, whether within or without the State of Florida, the Appellant would have to pay the Florida producer for such milk at the Class I price of 61c per gallon.

What everybody knows, the Courts are presumed to know, and of such matters may take judicial cognizance. **Nev-Cal Electric Securities Co. v. Imperial Irr. District, 85 Fed. 2d Certiorari denied, 300 U.S. 662.**

It would therefore seem proper for the Court to recognize the effectiveness of the orders of the Florida Milk Commission insofar as the insulation of Florida producers is concerned, with the resulting impediment to the flow of interstate commerce.

One of the strongest arguments in support of Appellant's position that Chapter 501, Florida Statutes, and the orders arising thereunder are unconstitutional, is reflected in the dispute now raging between the State of Alabama and the State of Florida. The newspaper articles contained in Appendix "F" at Pages 54-57 reflect the vice inherent in such orders and have alerted this entire community to the fact that unless the evils complained of are corrected, reprisals against Florida citrus can well be expected.

Florida Statute 501.13(8), Appendix "D", Page 44, contains virtually the exact language of the New York statute which Mr. Justice Cardozo, speaking for a unanimous court, struck down in **Baldwin v. Seelig**, 294 U.S. 511. The Appellee has contended that the Commission has not attempted to enforce this specific portion of the Statute, but such a position overlooks the fact that it has attempted to control the price at which Florida milk may be sold ouside the State of Florida, and to discriminate against out-of-state producers who can never acquire a "base" with the Appellant. Also, if the Appellant should attempt to assign any part of its Class I sales to an Alabama producer, the Appellant would be in violation of the Commission's Orders and would be subject to having its license suspended or revoked and to having other sanctions and criminal penalties enforced against it.

The orders, rules and regulations of the Florida Milk Commission are continuing, certain restraints, by which the Appellant milk distributor is constrained by economic considerations from securing its supply of milk from out-of-state sources whenever it chooses to do so, and in addition thereto, Appellant is required to pay 61c per gallon for milk of the same quality and purity that could be obtained from the State of Alabama having a price of 35c per gallon.

The base relationship between the Appellant and its Florida producers is a continuing and permanent one. It cannot be terminated except for just cause, and economic or business reasons do not constitute just cause.

The lower court, in its Opinion, said:

> "The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question, and this is what the plaintiff would have us do."

It is respectfully submitted that insofar as this Appellant is concerned, the evidence clearly revealed facts, many of them undisputed, which reflected that as to this Appellant, the injury, or threat of injury, was not hypothetical, but was real. A few examples may well illustrate this particular situation:

(1) Mr. Fisher, the Administrator of the Florida Milk Commission, was interrogated about the fact that the base percentage figures of Exhibit "L" of the plaintif's complaint set forth its various producers' percentages, which totaled 100% of the Class I milk sales to be divided among the various Florida producers, and, when asked if the Florida Milk Commission would require the Polar Company to pay to the Pensacola producers that have this so-called relationship, the percentage shown opposite each producer's name of the Class I sales, answered:

> "As a contractual relationship between the distributor and the producer, we would require that."

Then the following interrogation and testimony by Mr. Fisher took place: (Transcript of Testimony, Page 121, 133 and 123)

> "Q And no Alabama producer would have protection, would it?
>
> A Not necessarily.
>
> Q The Florida producer then would come first with respect to getting it so far as your order is concerned, with getting this percentage of the Class I sales, as a first cut?
>
> A In the base relationship, that is right.

Q And would be preferred over any other producer who may have delivered milk to that plant from Alabama, Mississippi, or what you?

A I would say, yes, because that is a contractual relationship between Polar Ice Cream & Creamery and their producers.

Q What do you mean by 'contractual relationship'?

A That is a contract whereby they have received or accepted milk over a period of time, and it is usually set up on a, during a base period which is September, October and November in the Pensacola area, and that is when your bases were open, however, they are now frozen, and we have taken those bases that were established by a previous course of dealing.

Q You mean to tell me that the Commission hasn't ordered the Polar Company to pay these percentages?

A Will you repeat that question?

Q Do you mean to tell me that the Polar Company is not under Commission order to pay these percentages and this is something of a voluntary contractual relationship?

A It is a contractual relationship. We have audited those figures and prepared those bases.

Q You have ordered them to pay those percentages, have you not?

A Right.

Q And if they don't pay them what do you do?

A Well, I can imagine we will have a Show Cause Order.

Q You will cite them with a Show Cause Order as to why their license shouldn't be suspended or revoked if they don't pay these percentages as set forth in this letter, is that correct?

A I don't believe that they are contesting those percentages.

Q I am asking you a question and I want an answer. If they don't pay these percentages would you not cite them to Show Cause?

A Yes, I think we would."

The newspaper articles and editorial contained in Appendix "F" hereof also refute the Conclusion of the lower court that the application of the law was hypothetical.

2. When asked if milk sold under a bid to a military installation would be classified as Class I, Mr. Fisher, the Administrator of the Florida Milk Commission, replied that if they used producer milk, that would be Class I, yes, at 61c per gallon. At Pages 124 and 125 of the Transcript of Testimony, is found the following interrogation of Mr. Fisher:

"Q And you would require the Polar Company then to account to the producers for that milk sold to Ft. Benning camp just as Class I milk and you would take that percentage up to these people named and you would count that in your auditing computation?

A It takes the Classification of Class I milk, it is for human consumption, and we would take that in if they used their producers milk.

Q It would be 61c a gallon?

A Yes, and they know that when they use it.

Q Now, do you impose a tax of any kind upon this milk that is bid and sold to military installations?

A That's a regulatory fee."

Thereafter, Mr. Fisher was further interrogated as follows: (Transcript of Testimony, Page 127)

"Q Now, Mr. Fisher, are you aware of the fact that the Alabama distributors do sell in the Pensacola marketing area in competition with the Polar Company?

A Yes sir.

Q Are you aware of the fact that the Alabama producers, the distributors can buy milk at cheaper prices?

A Yes sir.

Q At the present time are you not trying as the Commission to work out some sort of an arrangement with the Alabama Milk Control Board in which to try to solve the Pensacola problem?

A We have tentatively set up a date.

JUDGE JONES:

What has that got to do with this case?

MR. McCLAIN:

It only shows, Your Honor, the fact that there is an Interstate Commerce question."

4. At the request of Judge Jones of the lower Court, counsel for Appellees attempted to clear up the contractual relationship betwen the parties, as follows: (Transcript of Testimony, Pages 129-130)

"Q Now, Mr. Fisher, you testified that you considered this base relationship between a distributor and its producers to the contractual relationship based upon a previous course of business dealings, would you amplify that insofar as the position of the Florida Milk Commission is concerned?

A Well, it is the position of the Milk Commission that they are more or less a referee in seeing the contractual relationships are lived up to by both parties.

Q You mean then, Mr. Fisher, that the State has by this statute created the relationship between them and defined the rules under which it will be supervised and then calls this base a property right, is that correct?

A I think so, yes.

Q You didn't intend to suggest to the Court that there is a separate written instrument voluntarily entered into between the distributor and the producers?

A No sir."

The Court's attention is respectfully called to the fact that the Appellant, in its complaint, prayed for a temporary restraining order, and thereafter a perma-

nent injunction, and the prayer further contained a request that Chapter 501, Florida Statutes, and all orders issued pursuant thereto, be declared and adjudged to be null and void, unconstitutional and of no effect. It is an elementary principle of law that an injunction will issue against a threatened harm or wrong, and certainly, from the foregoing testimony, the injury or threat of injury to the appellant is amply reflected. Appellant is entitled to lawfully operate its business without fear of loss of license because of unlawful acts of Appellees and Courts should ever be open to grant protective relief.

As heretofore stated, the base relationship thrust upon appellant by order of the Florida Milk Commission was set forth in a percentage ratio, totaling 100% of Class I sales for Florida producers, and is not confined to a certain number of gallons delivered to Appellant by its Florida producers. Thus, there is no way of predicting or determining what gallonage of milk the appellant must at any future time accept from its Florida producers and pay for at Class I prices. Obviously, if the Florida producers should increase the size of their herds, the gallonage would go up without limitation. Thus, the appellant finds itself in a position of having to take an ever increasing amount of Florida milk at a price of 61c a gallon, even though Alabama milk or milk from other states, of equal quality and purity, could be purchased at 35c per gallon.

The fact that the Appellant can be forced to accept all milk tendered by a producer has been upheld by the Supreme Court of Florida in the case of **Borden, et al, v. Odham, 121 So.2d 625.** The Florida milk law and the Commission have given preferential economic treatment to the Florida milk producer. He is protected from competition of out-of-state milk. There has been raised an economic barrier against the free import of out-of-state milk.

As stated by Mr. Justice Cardozo in **Baldwin v. Seelig, 294 U.S. 511:**

> "It is the established doctrine of this Court that a State may *not, in any form* or under any guise, directly burden the prosecution of interstate business. . . . Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation.' . . . If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."

This Court in **Dean Milk Company v. City of Madison, 340 U.S. 349,** said:

> "In thus erecting an economic barrier protecting a major local industry from competition without the state . . . plainly discriminates against Interstate Commerce."

This Court in the recent case of **Lehigh Valley Coop. Farmers, Inc. v. United States, 370 U.S. 76,** had occasion to consider the provisions of **Section 8c(5)(G) of the Agricultural Marketing Act of 1937, 7 U.S.C. §608c,** which provides:

> "No market agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

The Court thereafter recognized the plain mandate of the Congress in providing against action which would stop the free flow of commerce of dairy products and struck down a compensatory payment provision of a federal milk marketing order.

In view of the foregoing analysis of the Florida milk regulatory action, can there be any doubt that the interstate flow of milk is unduly burdened and obstructed by the subtly conceived and cleverly administered scheme designed to isolate and insulate the Florida producer from competition with out-of-state milk? Certainly the orders of the Milk Commission in applying the statute were so flagrantly violative of the Constitution as to entitle the Appellant to the injunctive relief prayed for, which was denied by the Court below.

## QUESTION TWO

> Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has been ceded to the United States of America in accordance with Article I, Section 8, Clause 17, of the Constitution of the United States, violates Article VI, Clause 2 (Supremacy Clause) of the Constitution of the United States and Federal procurement statutes and policy.

The case of **Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285,** held that the United States Constitution prohibited California from applying its minimum milk price regulations to sales consummated on lands over which the United States had acquired exclusive jurisdiction.

In **Public Utilities Commission v. United States, 355 U.S. 534,** this Court held that a state system of price regulation could not be applied to procurement by the United States, in view of the Federal policy which provides in detail for a method of purchase intended to assure that the United States obtains the benefits of competition among and free bargaining with private sellers of supplies or services.

The case of **Paul v. United,** .....**U.S.**....., **83 S.Ct.Rpt. 426,** held that state price regulations were not applicable to sales of milk to the United States at military installations exclusive jurisdiction to which had been ceded to the United States.

In the Paul case, the question of producers' prices was not in issue, but the dissenting opinion, in Footnote 5, recognized the pertinency of the argument that the fixing of minimum producer prices would be in conflict with the court's view of federal procurement policy and said:

> "It should be noted that the Court's decision today is likely to affect federal as well as state price regulation. For example, a large part of the milk marketing regulation in the United States is presently accomplished under federal marketing orders pursuant to § 8c of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608c, 7 U.S.C.A. § 608c. See 7 CFR 1001 et seq. Federal marketing orders typically maintain minimum producer prices, and this regulation, in turn, has the effect of

maintaining a certain level of handler prices. See, eg., Lehigh Valley Co-op Farmers, Inc. v. United States, 370 U.S. 76, 78-83, 82 S.Ct. 1168. 1170-1172, 8 L.Ed.2d 345. It is perhaps for this reason that the Government has abandoned its attack upon California's producer price regulation in the present case. The Govevrnment's change of position, however, is only a matter of discretion, and it can hardly be contended that a scheme of producer price maintenance would be any less in conflict with the Court's view of federal procurement policy."

The whole theory of the federal procurement policy is bottomed upon the necessity of full and free competition, and free bargaining, in order that the federal government may obtain the services and supplies it needs at the lowest overall cost to the United States. If Florida milk distributors are required to pay a minimum of 61c per gallon for milk of Florida producers used on military installations, such a requirement would, for all intents and purposes, eliminate Florida distributors from bidding on military milk contracts, if Florida milk were used. It is a matter of plain common sense that regulation of the price required to be paid by distributors to producers would certainly be projected in the bid of the distributor, so as to force the distributor to bid proportionately higher, which would conflict with the federal procurement policy.

Fort Benning, Georgia, Tyndall Field Air Force Base, Florida, and the Naval Air Station at Pensacola, Florida, are all military installations acquired in accordance with Article I, Section 8, Clause 17, of the Constitution of the United States, and the United States has exclusive jurisdiction of such military bases.

## QUESTION THREE

Whether Chapter 501, Florida Statutes, and all rules, regulations and orders issued thereunder, insofar as the same pertain to milk sold to an agency of the United States of America and delivered on military reservations exclusive jurisdiction to which has not been ceded to the United States of America, place a prohibition on the Federal Government and therefore so conflicts with Federal Procurement statutes and policy (Armed Services Procurement Act of 1947, 62 Stat. 22, 10 USC 2301, et seq.) as to be invalid under the Supremacy Clause, Article VI, Section 2, of the Constitution of the United States.

Even if the Navy Mine Laboratory, located in Bay County, Florida, is situated on land which has not been ceded to the United States of America, the regulatory aspects of the Florida Milk Act would, nevertheless, not be applicable to milk delivered to that installation.

The case of **United States of America v. Warne, 190 Fed. Supp. 645**, holds that the California Milk Stablization Act:

> "Places a prohibition on the Federal Government";

within the meaning of the "Public Utilities Case", and therefore so far conflicts with federal procurement statutes and policies as to be invalid under the Supremacy Clause, Article VI, Section 2, Constitution of the United States.

This view is supported by the case of **Paul v. United States, ..... U.S....., 83 S.Ct.Rep.426**, which contains a definitive examination of federal procurement policy. In the Paul case, the Court clearly recognized that subsequent to the case of **Penn Dairies, Inc. v. Milk Con-**

trol Commissioners of Pennsylvania, 318 U.S. 261, and before the Public Utilities Commissioner of the State of California v. United States, the federal procurement policy was revised and restated, and a comprehensive revision and restatement of the laws governing the procurement of supplies and services by the War and Navy Departments was passed by the Congress. The revision holds to the time-tested method of competitive bidding, and as was stated by the Court, the Paul case is not opposed to Penn Dairies, Inc. v. Milk Control Commissioners of Pennsylvania.

## QUESTION FOUR

Whether Chapter 501, Florida Statutes, is unconstitutional and is violative of the Fourteenth Amendment to the Constitution of the United States in the following respects:

(1) That it deprives the Appellant of property without due process of law.

(2) That it denies to the Appellant equal protection of the law.

(3) That it discriminates unreasonably, arbitrarily and oppressively against the Appellant.

The original Florida Milk Act was passed in the Depression years under an emergency condition, when this nation was in the throes of an economic depression. No such emergency now exists.

What would be a valid use of the police power of the state in an emergency would be an invalid exercise of power in defiance of the Constitution and the rights of the people guaranteed thereby after the emergency ceased.

The landmark case of the advocates of milk regulation is the case of **Nebbia v. New York, 291 U.S. 502, 79 L.Ed. 940.** Admittedly the New York statute which was challenged was an emergency measure passed during the depression years. The New York Court of Appeals, as is set forth in the dissenting opinion of Mr. Justice McReynolds, specifically recognized the fact that the act was passed as an emergency measure.

Thereafter, in a five to four decision, the Act was upheld by this Court in an opinion which recognized that:

> "a regulation valid for one sort of business or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

A strong dissenting opinion was written by Mr. Justice McReynolds where he traced the hazard of failing to protect constitutional guarantees under the guise of an emergency, and said:

> "What circumstances give force to an 'emergency' statute? In how much of the State must they obtain? Everywhere, or will a single county suffice? How many farmers must have been impoverished or threatened violence to create a crisis of sufficient gravity? If three days after this act became effective another 'very grievous murrain' had descended and half of the cattle had died, would the emergency then have ended, also the prescribed rates? If prices for agricultural products become high can consumers claim a crisis exists and demand that the Legislature fix less ones? **Or are producers alone to be considered, consumers neglected?** To these questions we have no answers. When emergency gives potency, its subsidence must

disempower; but no test for its presence or absence has been offered. How is an accused to know when some new rule of conduct arrived, when it will it disappear?"

How prophetic he was! Yet how true was his prophesy. For today in the face of an overwhelmingly surplus of milk, Florida milk producers now demand and receive 61c per gallon of milk, which is the highest price in the United States, when milk from Alabama of the same quality can be purchased for 35c per gallon — "Are the producers alone to be considered, consumers neglected?", as suggested by Mr. Justice McReynolds?

The Florida Milk Commission answers "Yes". Reason, good conscience, and the Appellant cry "No"!

There is now no need for the Florida Milk Act, as set forth in **Chapter 501, Florida Statutes.**

This Court in the case of **Lehigh Valley Coop. Farmers, Inc. v. United States, 370 U.S. 76,** recognized the surplus in the milk industry, and the evidence in this case shows that there is now a surplus in the milk industry and there has been for a period of ten years.

This Court can well take judicial notice that there is a tremendous surplus of milk and dairy products, and the evidence amply sustains this statement.

**Chapter 501, Florida Statutes,** regulates the **economic aspects** of the milk business, and in no way touches the requirements insofar as a pure, wholesome and sanitary criteria is concerned.

**Chapter 502, Florida Statutes,** contains a comprehensive code for milk, cream and milk products, which deals definitively with such matters as comprehensive definitions of all types of milk and milk products, labeling requirements, and provisions for inspection of milk which is produced within and without the State

of Florida. The Commissioner of Agriculture has the duty of enforcing the regulations with respect to purity of milk, and milk products, and this matter is wholly outside the purview of the powers granted to the Florida Milk Commission by reason of **Chapter 501, Florida Statutes.**

It is thus all too apparent that there is no need for a Milk Control Act to (1) preserve public health, (2) morals, (3) safety and welfare.

It cannot be argued that the welfare of the citizens of Florida at large could be promoted by forcing a distributor to purchase milk from a producer at 61c per gallon, which is the highest price for the sale of such milk in the United States of America.

There was evidence that the surplus condition in the milk industry is getting worse and that milk could be sent from Northwest Wisconsin with a 36 hour delivery in Pensacola, which would be approved by the United States Department of Health services, and would meet the health requirements of the State of Florida. It is, therefore, clear that there is no problem with respect to a pure and wholesome milk supply.

**Chapter 501.21, Florida Statutes** states that there is a continuing emergency and need for the existence of the Florida Milk Act, that it shall be effective until such time as it shall be appealed or amended by some subsequent act of the legislature. (Appendix "D", Page 47).

Therefore it can be reasonably inferred that the Legislature presumed that there was a continuing emergency, but it is respectfully submitted that the evidence taken in this case conclusively rebuts that presumption.

Legislation must be reasonable in the sense that it must be based on reason as distinct from being wholly

arbitrary or capricious. It therefore follows that if the statute or regulation is unreasonable it cannot be enforced.

Legislative determination is conclusive upon the courts only within constitutional limits, which leaves open for judicial inquiry all questions as to the actual effect of attempted police measure upon constitutional rights. **Adams v. Tanner, 244 U.S. 590.**

Since the judicial branch of the government ascertains the validity of all legislation as measured by the Federal and State constitutions, and since the police power is subordinate to the organic law, the broad scope of the power does not place every regulation touching it within legislative competence, because of the power of the courts to determine whether legislative action conflicts with the organic law or is arbitrary and unreasonable and therefore void. Hence, a determination by the legislature as to what is a proper exercise of the police power is not final and conclusive, but is subject to the supervision of the courts.

The Appellant is well aware of the rule as well set forth in **Massachusetts v. Mellon, 262 U.S. 447, L.Ed. 1078, 43 Sup.Ct, 597, Headnote 5**, as follows:

> "To invoke judicial power to disregard a statute as unconstitutional, the party who assails it must show not only that the statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The present position of the Appellant certainly falls well within the requirements of this rule, as evidenced, among other things, by the following:

1. It has been ordered to take all milk produced by its allocated Florida producers, pay the percentage ratio to each producer, as set forth on Exhibit "L" of

the Complaint and pay 61c per gallon for each gallon of milk used in Class I consumption, even though it could purchase milk of identical quality and wholesomeness from Alabama or elsewhere at a price of 35c per gallon.

2. That it is in direct competition in Class I sales on the streets of Pensacola with Alabama distributors who can purchase milk from Alabama producers and sell the same in Florida at a much less price.

3. That it is forced into a contractual relationship, created solely by the Milk Commission, which it is not free to terminate except by showing just cause acceptable to the Commission.

4. That it must pay 61c for each gallon of Florida milk purchased, delivered to a military installation, whether within or without the State of Florida.

5. That a tax of 15c per 100 gallons is now imposed on it for each gallon of Florida milk sold, whether to a military installation or in other trade channels.

6. That in event of a violation of any rules or regulations of the Milk Commission, the Appellant can be subjected to loss of license, as well as criminal penalties, and at the time of the decision of the lower court, there was pending against it a Show Cause Order why its license should not be terminated for failure to so comply with the provisions of Chapter 501, Florida Statutes, and the Orders of the Milk Commission. And thereafter an order of the Milk Commission was entered revoking Appellant's license, which order is presently being appealed to the District Court of Appeals of Florida, First District.

The Florida Milk Act and action of the Commission thereunder deprive the Appellant, without due process of law, of its liberty of contract, its property, and also deny equal protection of the law.

## CONCLUSION

For the foregoing reasons, there are substantial federal and constitutional questions involved, and it is submitted that an Order should be entered noting probable jurisdiction, or postponing consideration of the question of jurisdiction to the hearing of the case on the merits, and thereafter, that the decision of the lower court be reversed.

Respectfully submitted,

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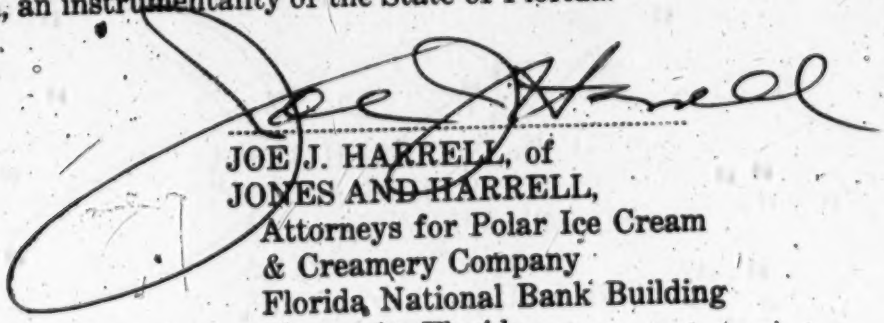
## PROOF OF SERVICE

I, JOE J. HARRELL, one of the attorneys for POLAR ICE CREAM & CREAMERY COMPANY, Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20 day of February, 1963, I served a copy of the foregoing Brief in Opposition to the Motion to Affirm, together with Appendix, on the several parties hereto by mailing a copy in a duly addressed envelope, airmail, postage prepaid, to their respective attorneys of record as follows: RICHARD W. ERVIN, Attorney General, State of Florida, Tallahassee, Florida, and JOSEPH C. JACOBS, Assistant Attorney General, State of Florida, Tallahassee, Florida, Attorneys for Charles O. Andrews, Jr., Chairman, Alex Shaw, Jackson Logan, Robert C. Carter, Mrs. Charlotte Tomlinson, John H. Cone, and Dr. James Acree, as and constituting the Florida Milk Commission, and Florida Milk Commission, an instrumentality of the State of Florida.



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